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No. 481

IN THE

Supreme Court of the United States

October Term, 1960

TUG R. A. TURRENTINE, HER ENGINES, ETC., AND BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Brown & Root, Inc., respondent and claimant of the Tug R. A. TURRENTINE, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the final decree of the United States District Court for the Southern District of Texas in favor of the libellant American Home Assurance Company and remanding the cause for further proof upon the cross-libel of Brown & Root against Magco Towing Company for unpaid tug hire.

Opinions Below

The opinion of the Court of Appeals is reported at 279 F. 2d 811 and appears *infra* Appendix, p. 25, *et seq.* The unreported opinion of the United States District Court is printed *infra* Appendix, p. 34, *et seq.*

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 13, 1960, and copy thereof is printed *infra* Appendix p. 42. Thereafter petitioner presented to the Court of Appeals petition for rehearing, which was denied without further opinion on July 15, 1960.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 *Stat.* 928, 28 *U.S.C.* 1254(1).

Jurisdiction of the United States District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 *Stat.* 931, 28 *U.S.C.* 1333(1), amended Act of May 24, 1949, c. 139, Section 79, 63 *Stat.* 101.

The Questions Presented For Review

This petition presents only the following questions of law:

I.

A carrier engaged in the business of transporting on the inland waterways of Texas and Louisiana one principal commodity, aboard barges rented by it but towed by tugs owned and operated by it or tugs hired by it to tow the barges, contracted by a bill of lading to transport by barge a certain cargo. The barge used in such transportation was a rented barge, and the carrier hired peti-

tioner's tug to tow this barge. Is this transportation affreightment by one vessel, as held by Your Honors in *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, so that the tugboat owner sued by the insurer of the cargo for negligent towage causing loss of cargo would be entitled to the defense accorded by of Section 3 of the Harter Act, incorporated into the bill of lading covering the shipment, or can the towage of the barge be separated from the affreightment engagement, as the Court of Appeals has held, so that the cargo owner (and its subrogee insurer) can avoid the bill of lading provisions by suing the towing tug, with whom it had no contract, for negligence causing loss of cargo instead of suing the carrier?

II.

Where cargo is to be transported by a carrier on its rented barge pursuant to an issued bill of lading, and the carrier also hires a tug to tow the barge and thus uses a hired barge and a hired tug to fulfill its affreightment obligations, is the tugboat owner subject to suit by the subrogee insurer of the cargo owner, with whom the tugboat owner has no contractual relations, for damage to the cargo allegedly caused by negligent towage, and can the affreightment agreement be thus avoided by the cargo interests and yet the tower be held to the obligations of the carrier and at the same time denied the carrier's defenses?

III.

Where the bill of lading (incorporated by reference in the issued short form bill of lading) allows the carrier the benefit of any cargo insurance, and the cargo insurance

policy contains warranties against such a clause but provides unequivocally that nevertheless the insured shall be paid in the event of loss a sum sufficient to cover its loss in the form of an irrecoverable loan, a "loan receipt" be- g used, is the owner of the towing tug hired by the carrier entitled to the defense of the bill of lading benefit of insurance clause in the suit brought by the insurer (not the cargo owner) as subrogee, or is this defense to be denied because the tug was only engaged to tow the barge laden with cargo and was not a party to the bill of lading af- freightment agreement?

IV.

Where an insurance company as subrogee files its libel to recover the amount paid its insured for lost cargo against a towing tug not privy to the insurance agreement, and no other claims for any recovery of any kind from the towing tug are made, by either the shipper or by the carrier that engaged the tug to supply the motive power for the transportation of cargo, is it proper to remand the cause to allow possible offsets by the impleaded shipper and carrier or the insurer to the tower's claim for tug hire admittedly unpaid?

Statutes Involved

Section 3 of the Harter Act, 46 *U.S.C.* 192, being Act of February 13, 1893, C. 105, Sec. 3, 27 *Stat.* 445.

Section 302(e) of Part III of the Interstate Commerce Act, being 49 *U.S.C.*, Sec. 902, Act of February 4, 1887, C. 104, Part III, Sec. 302, as added September 18, 1940, C. 722, Title II, Sec. 201, 54 Stat. 929.

Section 303(b) of Part III of the Interstate Commerce Act, being 49 U.S.C., Sec. 903(b), Act of February 4, 1887, C. 104, Part III, Sec. 303, as added September 18, 1940, C. 722, Title II, Sec. 201, 54 *Stat.* 931, as amended.

Statement

This is in essence a suit for cargo damage, brought in its own name by the cargo insurer, but brought not against the carrier but rather against the tug hired by the carrier to tow its rented barge laden with the cargo.

The Court of Appeals held the circumstances constituted towage and not affreightment, and permitted cargo to recover from the tug, denying the tug Harter Act defenses provided for in the bill of lading covering the cargo shipment.

The cargo owner and the cargo consignee, respectively Magcobar, Inc., and Magnet Cove Barium Corporation, were corporations whose entire stock was owned by Dresser Industries, Inc. The cargo insurance policy issued by respondent American Home Assurance Company named as the assureds "Dresser Industries, Inc., and affiliated or subsidiary companies." What was meant by "affiliated or subsidiary companies" does not appear of record.

Magco Towing Company, Inc., was a carrier, engaged in the business of transporting by barge cargoes of drilling mud (in sacks and in containers, not in bulk) over the inland waterways of Texas and Louisiana. While it did not hold itself out to the public generally as a carrier and had no certificate of public convenience and necessity, on the other hand it had customers other than its principal customers Magcobar, Inc., and Magnet Cove Barium Corporation. Its stock was owned by individuals except for

ten per cent thereof, which was owned by Magnet Cove Barium Corporation.

Magco Towing Company, Inc., in its business of water carriage used vessels owned by itself and vessels chartered or hired from others. For the carriage of the cargo on the occasion the subject of this suit, it used a flat-decked barge it had under hire upon a monthly basis, and it engaged petitioner's tug to tow this barge, at that time empty, to the port of loading and then back again to the port of discharge. Both such ports were in Texas, and the towage was to be on inland waterways within the limits of Texas.

It was upon the return leg of the trip that the tug and barge encountered heavy weather and part of the cargo of drilling mud in sacks was lost, by the negligence of the crew of the tug the Court of Appeals has found, under circumstances which would have enabled the carrier to assert the defenses allowed a carrier by Section 3 the Harter Act had this engagement constituted an affreightment and not towage, as that Court further found.

The cargo actually moved under a short-form bill of lading, printed and furnished by the shipper Magnet Cove Barium Corporation. It is reproduced below as Appendix I. (By typographical error in filling in the blank printed form, the carrier and consignee were reversed, but the parties have by stipulation corrected this error.) The shipper by this issued bill of lading acknowledged itself bound by and fully acquainted with the terms of the Uniform Domestic Straight Bill of Lading, which gives the carrier the benefit of the defensive provisions of the Harter Act, Appendix II, and contains a benefit-of-cargo insurance clause.

Respondent insurance company paid the cargo owner and consignee the sums to which they were entitled under the terms of the cargo policy, taking from them a loan receipt, reproduced as Appendix VI, p. 46. The cargo insurance policy contained a warrant, against an insured making claims arising from cargo losses where the bill of lading contained a provision as it did here giving the carrier the benefit of the shipper's cargo insurance, but the insurance policy further provided that even though there was such a bill-of-lading provision the insurer would irrevocably pay the insured's claim, under a loan receipt, and look only to the carrier for recovery of its losses. Appendix VI.

Respondent American Home Assurance Company filed its libel seeking recovery as subrogee of the amount paid Magcobar, Inc., and Magnet Cove Barium Corporation, cargo owner and shipper and consignee, and no other claim for any losses whatsoever by any party was made against petitioner. Petitioner impleaded in addition to the cargo owner and consignee the carrier, Magco Towing Company, Inc., with whom alone it had its towage agreement, and it made claim against the carrier for the amount the carrier had agreed to pay petitioner for towing the barge and which it had admittedly not paid. No claim for any loss was made by the carrier against petitioner.

The trial court held that the cargo was lost through the negligence of the tug, a valid defense to the claim under Section 3 of the Harter Act, but held that petitioner was engaged only to tow the barge and its engagement was not one of affreightment, and hence it could not urge the Harter Act defenses accorded the carrier under the bill of lading covering the shipment nor the defense allowed the carrier of the benefit of insurance provision provided

for by the bill of lading because not a party to the bill of lading.

The Court of Appeals affirmed the decision of the District Court, holding the Harter Act defenses sufficient to defeat the claims, distinguishing the case of *Sacramento Navigation Company v. Salz*, as one where both the tug and cargo-laden barge were owned by the carrier, and the transportation was by one instrumentality accordingly, and since there was no agreement that the tug or its owners would transport the cargo of the barge the case was one simply of towage, under its decision in *Mississippi Valley Barge Line Company v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den. 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76. It further held that the carrier here could not have claimed the benefit of insurance provision in the bill of lading, and particularly petitioner could not since it was not a party to the bill of lading and was not the carrier. The Court of Appeals did, however, distinguish the Mississippi Valley Barge Line case as one where the *carrier* was not allowed to recover the transportation charge and remanded the cause for the District Court to determine whether the petitioner's claim for towage should be allowed, referring to the possibility of offsets.

Reasons For Granting The Writ

Your Honors should grant writ of certiorari in this cause for the following reasons:

(1.) To correct the misapprehensions of the Court of Appeals for the Fifth Circuit and to settle that when a water carrier in accordance with the provisions of an issued bill of lading undertakes to transport cargo aboard a barge without motive power, and the carrier necessarily uses a

tugboat to tow the cargo-laden barge, the barge and tug constitute one vessel to perform the affreightment of the cargo, as held in *Sacramento Navigation Company v. Salz*, and the cargo transportation cannot be fragmented into affreightment on the one hand and towage of the cargo-carrying barge on the other so that the cargo interests (here the subrogee insurer) can evade the defenses in the affreightment agreement by suing the tug instead of the carrier. We submit that to hold as the Court of Appeals for the Fifth Circuit does in the case at bar is to grievously misinterpret the holding in *Sacramento Navigation Company v. Salz*, and is to decide directly contrary to the decision of the Circuit Court of Appeals for the Second Circuit in *In Re O'Donnell*, 2 C.C.A., 1928, 26 F. 2d 334, the decision of the Circuit Court of Appeals for the Third Circuit in *Insurance Company of North America v. Southern Transportation Company*, 3 C.C.A., 1928, 25 F. 2d 103, affirming *The Bathgate*, E.D. Pa., 1927, 19 F. 2d 663 and the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Fred Smartley, Jr.*, 4 C.C.A., 1939, 100 F. 2d 971, and contrary to the jurisprudence of these circuits as further reflected in *The Lehigh*, W.D. N.Y., 1935, 12 F. Supp. 75, *The Marmor*, S.D. N.Y., 1944, 56 F. Supp. 435, and *The Vale Royal*, D. Md., 1943, 51 F. Supp. 412. The affirmation by the Honorable Court below of its adherence to its decision in *Mississippi Valley Barge Line Company v. T. L. James & Co.*, in spite of the doubt of the validity of that decision expressed in the concurring opinion below, and in spite of the decision of this Honorable Court in *River Terminals Corporation v. Southwestern Sugar & Molasses Company*, 360 U.S. 411, which in effect overrules the *Mississippi Valley Barge Line Company v. T. L. James & Co.* decision, shows plainly that

unless a writ be granted herein the jurisprudence in the Fifth Circuit upon the important questions here involved will be in conflict with that of the other circuits referred to.

(II.) To clarify the law that where a tug is engaged by the carrier to perform its bill of lading transportation obligations in supplying motive power for the cargo-laden barge, the cargo owner cannot hold the tug to the obligations of a carrier in its suit for negligent damage to the cargo upon the towed barge and at the same time be denied the carrier's defenses, under the device of suing for negligent towage, and to settle that where cargo is carried under an affreightment agreement the rights of cargo arise out of and are governed by the terms of that agreement and cannot be enlarged by the cargo interest suing as though a party to a towage agreement.

(III.) To clarify the law that when a cargo insurance policy unqualifiedly obligates the insurer to make payment to the insured even though the insured breaches a policy warranty against shipping cargo pursuant to a bill of lading giving the carrier the benefit of any insurance upon the cargo (such payment by the insurer therefore not being a "voluntary" one though denominated a "loan") the carrier and those engaged by the carrier to perform its carriage contract are entitled in a suit brought by the insurance company to defend the suit upon, and be relieved from liability to the insurer by reason of the bill of lading benefit-of-insurance provision, as held in *Phoenix Insurance Company v. Erie & W. Transport Company*, 1886, 117 U.S. 312, 6 S. Ct. 750, 29 L. Ed. 873, and *Wager v. Providence Insurance Company*, 1893, 150 U.S. 99, 14 S. Ct. 55, 37 L. Ed. 1013.

(IV.) To correct the error of the Court of Appeals in remanding the cause to permit possible offsets to be made against a party to an admiralty suit's claim for tug hire admittedly unpaid by the carrier, where neither the carrier nor the cargo owner and consignee nor the subrogee cargo insurer have made any affirmative claims nor claimed any offsets, contrary to the holdings of *Ward v. Chamberlain*, 1858, 21 How. (62 U.S.) 572, 16 L. Ed. 219, *The Dove*, 1875, 91 U.S. 381, 23 L. Ed. 354, and *The Edward H. Blake*, 5th Cir., 1899, 92 F. 202, that a party to an admiralty suit cannot have an affirmative recovery without pleading.

I.

The shipper here entered into an affreightment contract (the printed form being actually furnished by the shipper and being a bill of lading on a short form which expressly embodied the provisions of a Uniform Domestic Straight Bill of Lading, Appendix V) by the terms of which the carrier agreed to transport the cargo by barge from Brownsville to Corpus Christi, Texas. While the carrier owned vessels, it used in this cargo transportation a cargo barge which it did not own but which it had under monthly hire, on which barge it loaded the cargo, consisting of a large number of sacks containing drilling mud. The carrier hired petitioner's tug to provide the motive power for the transportation and to tow this barge.

It is of course the case that many carriers and probably most of them hire or rent equipment in the prosecution of their transportation business. On the inland waterways of the nation there is a great use of chartered barges towed by chartered tugs, just as on land railroad companies use

locomotives the actual ownership of which may be in others, and refrigerator and chemical and tank cars and other kinds of railroad cars which the carrying railroad does not own. On the nation's highways motor carriers often do not own the tractor trucks which tow the cargo-laden trailers, nor those trailers, each of the parts of the cargo transporting unit being leased or rented from another.

Yet, as clearly held in *Sacramento Navigation Company v. Salz*, there can be no doubt that whatever the ownership of the parts of the instrument used to carry the cargo from one point to another, since both the part upon which the cargo actually rests and the part supplying motive power for the movement of the cargo and its vehicle are necessary to perform the carriage, at law they constitute as they do in fact *one instrumentality* to perform the carrier's obligation to transport the cargo.

This common-sense adjudication has received statutory affirmation in Part III of the Interstate Commerce Act, where it is provided by Section 303, "For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel." 49 U.S.C., Sec. 903(b).

With respect to facts almost identical to these of the instant case the Circuit Court of Appeals for the Second Circuit in *In Re O'Donnell*, 2nd Cir., 1928, 26 F. 2d 334, specifically allowed the tug owner the defenses of the Harter Act, and rejected the test of separate ownership of the tug and barge, here used by the Court of Appeals to distinguish this case from the holding in *Sacramento Navigation Company v. Salz*.

In *The Bathgate*, E.D. Pa., 1927, 19 F. 2d 663, affirmed sub. nom. *Insurance Company of North America v. Southern Transportation Co.*, 3rd Cir., 1928, 25 F. 2d 103, cert. den. 277 U.S. 589, 48 S. Ct. 437, 72 L. Ed. 1002, the towing tug was privately owned as here and not a common carrier. In language exactly pertinent here the trial court said:

> "The reasoning of this case (Sacramento Navigation Company vs. Salz) corrects the view of the admiralty bar. The true doctrine is now known to be that a carrying barge, with the tug which tows her, form a unit, and as such are to be deemed, for the purposes of the Harter Act, a carrier within its benefits. There is now no distinction in respect to exemption from liability between a carrier supplied with her own motive power and one the motive power of which is supplied by a tug;"

and on appeal the distinctions now partly relied on by the Court of Appeals in the instant case were rejected, the Circuit Court of Appeals for the Third Circuit saying:

> "It is contended, the present case being *in rem* and the cited case (Sacramento Navigation Company vs. Salz) *in personam*, the Bathgate being privately owned and not a public common carrier, and that the charter provided additional rates for different variations, make the cited case inapplicable. We cannot agree with these contentions, for to us the present situation is in substance the same as that before the Supreme Court in the Sacramento case."

In still another circuit, the Fourth, in a case where the carrier, as the carrier did in the instant case, hired the tug of another to tow the cargo-laden barge and thus to per-

form the carriage agreement, it has been held that the contract was one of affreightment and the vessels constituted one instrumentality to carry out that affreightment, and the tug was allowed the carrier's Harter Act defenses. *The Fred Smartley, Jr.*, 4th Cir. 1939, 100 F. 2d 971.

District Court cases in accord are *The Vale Royal*, 51 F. Supp. 412, and *The Marmor*, D.C. N.Y. 1944, 56 F. Supp. 435.

Of course in the instant case the carrier was not a common carrier, as the Court of Appeals notes. It had no certificate of public convenience and necessity. But it was nevertheless a water carrier engaged in the transportation of cargo (even though principally only one kind of cargo) on the inland waterways of Texas and Louisiana. It was certainly therefore a private carrier, and was under the Interstate Commerce Act a contract carrier. 49 U. S. Code 902(e), being Sec. 302(e) of the Interstate Commerce Act Act of February 4, 1887, Part III, Sec. 302, as added September 18, 1940, c. 722, Title II, Sec. 201, 54 Stat. 929.

That the fact it was a private carrier and not a common carrier does not make unavailable to it the Harter Act defenses embodied in the bill of lading is clearly settled, contrary to the view stated in the concurring opinion below. The correct rule is clearly stated in *Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, 2 C.C.A., 1937, 89 F. 2d 865, cert. den. 302 U.S. 706, 58 S. Ct. 25, 82 L. Ed. 545, as follows:

> ". . . The policy declared in sections 1, 2, and 4 is plainly inapplicable to private carriers. As part of the same statute, section 3 must likewise be con-

fined to common carriers. In private carriage carrier and shipper may make such terms as they can agree upon. As this court recently declared in The Westmoreland, 86 F. 2d 96, at page 97:

> "'The charter, being for the whole barge, made her a private carrier and left the parties free to contract as they chose. The Fri, 154 F. 333 (C.C.A. 2); The G. R. Crowe, 294 F. 506 (C.C.A. 2); The Elizabeth Edwards, 27 F. 2d 747 (C.C.A. 2); The Nat Sutton, 62 F. 2d 787, 789 (C.C.A. 2). Thus the Harter Act was relevant only because the parties incorporated it.'

"It is urged by the appellant that The Westmoreland and the authorities therein cited contain only dicta on the subject of the applicability of section 3 to contracts of private carriage. Whether dicta or decision, they correctly state the law. By express reference section 3 may be incorporated into a contract of private carriage. Warner Sugar Refining Co. v. Munson S.S. Line, 23 F. 2d 194 (D.C. S.D. N.Y.), affirmed (C.C.A.) 32 F. 2d 1021. Without such express reference it is no more to be read into the contract than are section 1 and 2. Tice Towing Line v. James McWilliams Blue Line, 51 F. 2d 243, 246 (D.C. S.D. N.Y.) modified on another point in (C.C.A.) 57 F. 2d 183; contra, The Alberta M., 60 F. 2d 154 (D.C. E.D. N.Y.). Judge Inch was correct in refusing to follow the case last mentioned."

Clearly applicable forbidding the fragmentation of the carrying vessels engaged in the transportation of the cargo here, therefore, is the language of this Court in *Sacramento Navigation Company v. Salz*:

> "Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of

> the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end."

Plainly, the libel is *not* brought by the cargo insurer (who of course has no greater rights than its insured, *Wager v. Providence Insurance Co.*, 1893, 150 U.S. 99, 14 S. Ct. 55, 37 L. Ed. 1013; *Great Lakes Transit Corp. v. Interstate Steamship Co.*, 1937, 301 U.S. 646, 57 S. Ct. 915, 8 L. Ed. 1318; *Phoenix Insurance Co. v. Erie & W. Transportation Co.*, 1886, 117 U.S. 312, 6 S. Ct. 750, 29 L. Ed. 873) for breach of any *towage* agreement. It is in reality a suit for cargo damage, for improper *carriage*. The shipper is not a party to the agreement between the carrier and the tug owner for the use of the tug to tow the barge, and to permit suit by the cargo interests based upon the towage of the barge is completely foreign to the realities of the relationships here. If the towage agreement were the only pertinent agreement here, then the petitioner should be proceeded against only for damage to the barge, or for failure to deliver the barge, claims which are not made here at all and which could be made *only* by the carrier or the barge owner. This libel is in reality for damage to cargo, for improper carriage of cargo, *not* for improper towage of a barge.

If the tug is to be held liable to the cargo carried upon the barge, it is only fair and just that it be held liable only upon the same terms as the carrier, whose vessel in reality and at law as established by the holding of *Sacramento Navigation Company v. Salz* it clearly remains as an integral part of the transportation of the cargo.

The result of the holding of the Court of Appeals in the instant case is most illegal and unfair and not in accord with the realities of the transportation industry in another important aspect: If the tug owner whose tug is hired by the carrier to perform the affreightment agreement is not to be accorded as to the cargo carried the right to the carrier's defenses, it stands obligated to cargo *even more than the carrier does*, for it has no direct contract relation with the cargo owner, and cannot therefore contract for the carrier's defenses. It is denied those given the carrier by law. It is tied by the very act of towing to the cargo, and yet it cannot urge (if the Court of Appeals is correct) that it did not agree to transport cargo, it only agreed to tow a barge. In short, it is actually made a bailee.

Such a result plainly imposes upon the tug a greater responsibility than it has to the barge owner, where its liability is only in tort, *Stevens v. The White City*, 1932, 285 U.S. 195, 52 S. Ct. 347, and even a greater responsibility than it would have were it a sub-carrier, which cannot be sued under the carriage agreement by the cargo owner. *The Lizzie D. Shaw*, 2nd Cir., 1939, 92 F. 2d 65, cert. den. 302 U.S. 764, 58 S. Ct. 410, 82 L. Ed. 593.

Petitioner further submits that the Court of Appeals is relying upon a case of little authority in following its decision in *Mississippi Valley Barge Line Company v. T. L. James & Co.*, 5th Cir., 1947, 244 F. 2d 263. As demon-

strated above, that decision is contrary to the holding in *Sacramento Navigation Company v. Salz* and decisions in other circuits. And even though certiorari was denied, 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, the effect of the decision of the Court of Appeals in *River Terminals Corporation v. Southwestern Sugar & Molasses Company*, 5th Cir., 1958, 253 F. 2d 922, and the decision of your Honors in remanding that case, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, is to reverse the holding of *Mississippi Valley Barge Line Company v. T. L. James & Co.* The concurring opinion herein specifically expresses doubt of the correctness of that decision, and in fact the Court of Appeals has left the matter open for ultimate decision until entry of the final decree in the case. 256 F. 2d 344.

Petitioner therefore respectfully urges that the Court of Appeals below plainly committed most unjust and grievous error in fragmenting the cargo transportation engagement into two parts, separating the towing agreement from the affreightment contract and permitting the cargo interests to avoid and evade the Harter Act defenses in the affreightment agreement by permitting suit based on failure to perform properly the agreement to tow the barge, to which agreement the cargo interests were not a party. If, as petitioner respectfully urges and acknowledges is the actuality of the case, the tug was an integral part of the instrumentality of cargo transportation, it should be accorded the rights of and be subject to the obligations of the carrier; if the tug was merely engaged to tow the barge, its liability should be only to the barge in accordance with the law of towage, and liable to property of third persons aboard that barge only for willful neglect and damage, and *not* held liable to cargo being *carried* aboard

the barge under the guise of liability for negligence in *towing* the barge.

III.

The manifest error of the Court of Appeals in separating the petitioner's towing agreement from the carrier's contract for transportation of the cargo and denying petitioner the carrier's Harter Act defenses was repeated with respect to the bill of lading provisions allowing the carrier the benefit of the shipper's insurance of the cargo. Holding petitioner in that respect also no party to the transportation agreement, the Court of Appeals further compounded this error by holding that even the carrier could not have urged the benefit of insurance provisions.

This was manifest and grievous error, the Court of Appeals decision being plainly contrary to the holdings of *Wager v. Providence Insurance Co.*, 1893, 150 U.S. 99, 14 S. Ct. 55, 37 L. Ed. 1013, and *Phoenix Insurance Co. v. Erie & W. Transportation Co.*, 1886, 117 U.S. 312, 6 S. Ct. 750, 29 L. Ed. 873, which hold that the underwriter has only the rights of the assured, and where the assured has as here by the terms of the bill of lading given the carrier the benefit of the assured's insurance, the insurer cannot recover from the carrier.

The exception to this principle held by *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 1918, 248 U.S. 139, 39 S. Ct. 53, 63 L. Ed. 170, is not applicable to the circumstances of this instant case because the payment here was *not* a voluntary one. That case approved the common device of a loan to the insured by the underwriter using a loan receipt. It held that where there was actually a *voluntary loan* made by the insurer, and not an *obligatory*

payment made to the assured, the carrier could not claim the benefit of any insurance because actually there was no insurance payment by the insurer and hence no insurance whose benefit the carrier could by agreement secure. The opinion to that effect reads as follows:

> "Whether the transfer of money or other things shall operate as a payment, is ordinarily a matter which is determined by the intentions of the parties to the transactions. Compare the Kimball, 3 Wall. 37, 44, 18 L. Ed. 50. The insurer could not have been obliged to pay until the condition of their liability, *i.e.*, liability of the carrier—had been established. The shipper could not have been obligated to surrender to the insurer the conduct of the litigation against the carrier, until the insurers had paid. In consideration of securing then the right to conduct the litigation, the insurer made the advances. . . ."

In the instant case, though the loan receipt device was attempted to be used, the payment was not a voluntary one but *one required by the policy terms*. Appendix VII. The pertinent provision of the policy reads:

> "Notwithstanding the warranties contained in this clause it is agreed that in the event of loss of or damage to the goods by a peril or perils insured against by this policy for which the carrier or bailee denies or fails to meet his liability this Company *shall* advance to the assured as a loan without interest a sum equal to the amount they would have been liable to pay under this policy but for the above warranties the repayment thereof to be conditional upon and only to the extent of any recovery which the assured may receive from the carrier or bailee." (Emphasis ours.)

That the carrier can urge the benefit of insurance defense where the insurer's "loan" is actually an obligatory payment is held also in *China Fire Insurance Company v. Davis*, 2nd Cir., 1931, 50 F. 2d 389, cert. den. 284 U.S. 658, 52 S. Ct. 36, 76 L. Ed. 558; *J. W. & P. Armstrong, Inc. v. The Mormacmar*, 2nd Cir., 1952, 196 F. 2d 752, affirming 93 F. Supp. 930; *Aetna Insurance Company v. United States*, Ct. Claims, 1958, 162 F. Supp. 442.

(Petitioner points out that strictly speaking the loan receipt here the basis of the insurer's claim literally does *not* permit this suit. It first of all gives the insurer only the right to bring suit in the insured's name, which it did not do here, and secondly it permits suit only against the carrier or bailee. If as the courts below have held, the petitioner is not in the position of the carrier because only a tower, then the loan receipt literally does not grant respondent insurance company the right to proceed against petitioner or its tug, for it has long been settled that a towing tug is not a bailee. *The J. P. Donaldson*, 1897, 167 U.S. 599, 17 S. Ct. 951, 42 L. Ed. 292; *Stevens v. The White City*, 1932, 285 U.S. 195, 52 S. Ct. 347, 76 L. Ed. 699. And the insurance policy provisions also relate only to the carrier or bailee.)

The Court of Appeals was also in error in its reference to the law of Texas. The suit here is of course in admiralty, commenced by a libel for a maritime casualty, and hence admiralty principles and not the law of Texas were applicable and the law of the United States governs. But even if the law of Texas be applicable because the transportation here was upon waters wholly within the boundaries of Texas, still the principles referred to above prevail, for there is no difference between Texas law and the law of

the United States since by Texas law as by federal and maritime law the carrier is permitted to defend upon a bill of lading benefit-of-insurance clause. *Missouri Pacific Railway Co. v. International Marine Insurance Co.*, 1892, 84 Tex. 149, 19 S.W. 459.

IV.

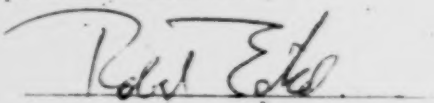
The Court of Appeals is manifestly in error also in not allowing without any qualification petitioner's claim for unpaid charter hire. Its holding is directly contrary to the long-settled principle that no party in an admiralty suit is permitted an affirmative recovery in the absence of pleadings seeking such a recovery. *Ward v. Chamberlain*, 1858, 21 How. (62 U.S.) 572, 16 L.Ed. 219; *The Dove*, 1875, 91 U.S. 381, 23 L. Ed. 354; *The Edward H. Blake*, 5th Cir. 1899, 92 F. 202.

There was no claim by any party, neither libellant insurance company nor the impleaded cargo owners nor the carrier, for any monetary recovery or set-off against petitioner, other than the claim by libellant for the exact amount paid the cargo interests under the cargo insurance policy. The petitioner was not paid by the carrier its tug hire, and in accordance with admiralty practice permitting adjudication in the same proceedings of all controversies, it made claim for these unpaid sums against the carrier. Plainly, there could be no set-off by any of the parties to this claim of petitioner in the absence of new pleadings and a completely new trial, and the action of the Court of Appeals in remanding the cause to permit this, while allowing the cargo interests a complete recovery against petitioner upon even broader grounds than they could urge against the carrier, was manifest error.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted and that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,



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APPENDIX I

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18016

TUG "R. A. TURRENTINE", Her Engines, etc., BROWN & ROOT, INC., Claimant, *Appellant*,

versus

AMERICAN HOME ASSURANCE COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas

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(June 13, 1960.)

Before HUTCHESON, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: A cargo of drilling mud was lost while being trainsported on the Barge ITC 6 between Brownsville and Corpus Christi, Texas. The shipment was under a memorandum bill of lading issued

by Magco Towing Company, here called Magco, showing Magnet Cove Barium Corporation, referred to hereafter as Magnet, as both shipper and consignee. The drilling mud was, it appears, owned by Magcobar, Inc., herein designated as Magcobar. Magnet was sales agent for Magcobar. Magco, Magnet, and Magcobar are affiliated companies. The barge was under bareboat charter from its owners to Magco. An arrangement had been made by Magco with Brown & Root, Inc. for the towing of the barge empty from Corpus Christi to Brownsville and of the barge loaded from Brownsville to Corpus Christi for agreed amounts which had varied from time to time. The loading and unloading were done by Magco. On the occasion of the incident giving rise to this litigation the Tug R. A. Turrentine, of Brown & Root, took the loaded barge at Brownsville and was pushing it up the Intracoastal Canal to Corpus Christi. After the tug and barge had reached Corpus Christi Bay one of the cables between the tug and the barge broke. The master of the tug then reversed the positions of the two vessels and placed the tug in front of the barge. While an attempt was being made to get the tug and tow under way, the barge listed and about two-thirds of the cargo went overboard and was lost.

Insurance on the cargo had been undertaken by American Home Assurance Company on behalf of Magnet and Magcobar. The insurance company paid Magnet and Magcobar on a loan receipt. The insurer, taking a position as subrogee of its insureds, brought suit by libel against the Tug R. A. Turrentine and Brown & Root, Inc., as its owner, seeking recovery for the value of the lost cargo and asserted both unseaworthiness and negligence. Brown & Root, by a petition under

Admiralty Rule 56, impleaded Magco and its two affiliates. Liability of the tug was denied and a claim was asserted against Magco and its affiliates for the agreed amount of the tug hire. The district court found that the tug was negligent in several respects and its negligence caused the listing of the barge and the loss of the cargo. The defenses, hereafter discussed, of the tug and its owner were rejected and its claim for tug hire was denied. A decree was entered for the recovery by the insurance company from the tug and its owner, Brown & Root, Inc., of the value of the lost cargo. An appeal from that decree is before us.

The first of the three questions raised and argued on behalf of the tug is that Section 3 of the Harter Act[1] required a decree that the tug and its owner had no liability for the cargo loss. In support of this contention reliance is placed, primarily, upon the rule stated by the Supreme Court in *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663. In that case the tow and the barge were held and operated by the owner of both, which undertook by its bill of lading to transport the goods of a shipper "on board of" the barge. This, the court held, was a transportation by the barge and the tug as the instrumentality for carrying out the undertaking for carriage, and the contract was one of affreightment rather than of towage. In the case

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[1] If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworth and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel * * * 46 U.S.C.A. § 192.

before us there was no agreement that the tug or its owners would transport the cargo of the barge. Its obligation was to tow the barge from Corpus Christi to Brownsville empty and from Brownsville to Corpus Christi with a cargo. Such was the factual situation in *Mississippi Valley Barge Line Co. v. T. L. James & Co., Inc.*, 5th Cir. 1957, 244 F. 2d 263, cert den. 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76; mo. for leave to file pet. for reh. den. 358 U.S. 901, 79 S. Ct. 218, 3 L. Ed. 2d 152. In the opinion of this Court the Sacramento Navigation Co. case was discussed and its doctrine distinguished from the case, such as we have here, where the contract for the tug was for towage rather than affreightment. The full statement in the Mississippi Valley Barge Line case of the principle applicable here relieves us of the necessity of any further discussion of the question. See Robinson on Admiralty 673 et seq.; *Commerce Oil Corporation v. Dixie Carriers*, 5th Cir. 1958, 252 F. 2d 386.

The second point raised on behalf of the tug and its owner is that they should, by reason of bill of lading provisions, have been given the benefit of cargo insurance. The memorandum bill of lading which was issued by Magco to Magnet had a clause providing that:

> "It is mutually agreed * * * that every service to be performed hereunder shall be subject to all the terms and conditions of the uniform domestic straight bill of lading set forth (1) in official Southern, Western and Illinois freight classifications in effect on the date thereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment."

Introduced in evidence and relied upon by the owner of the tug as evidencing an applicable contract is a copy of a domestic straight bill of lading as set forth in official Southern, Western and Illinois classifications. In this exhibit it is provided:

> "Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance; Provided that the carrier shall reimburse the claimant for the premium paid thereon."

Since the transportation and towage which gave rise to this litigation was neither a shipment by rail, rail-water, nor motor carrier, it is difficult to see how the bill of lading called "official" could have been incorporated into the memorandum bill of lading when the stated condition of incorporation was not met. Even if it can be said that the memorandum incorporates the right of a carrier to benefit from insurance, it must also be said that the terms of the insurance contract have deprived the carrier of any such right. The insurance policy contains these provisions:

> "Warranted free of any claim in respect of goods shipped under a Bill of Lading or contract of carriage stipulating that the carrier or other bailee shall have the benefit of any insurance on such goods, but this warranty shall apply only to claims for which the carrier or other bailee is liable under the Bill of Lading or contract of carriage.

> "Notwithstanding the warranties contained in this clause it is agreed that in the event of loss of or damage to the goods by a peril or perils insured against by this policy for which the carrier or bailee denies or fails to meet his liability this Company shall advance to the assured as a loan without interest a sum equal to the amount they would have been liable to pay under this policy but for the above warranties the repayment thereof to be conditional upon and only to the extent of any recovery which the assured may receive from the carrier or bailee."

A warranty and bill of lading similar to those here before us, have been construed by the Texas Supreme Court in the case of *Insurance Company of North America v. Easton*, 73 Tex. 167, 11 S.W. 180, 3 L.R.A. 420. There it was said:

> "This provision * * * cuts off any construction of the policy whereby it could possibly be held to confer any right to benefit under it on a carrier of the property insured, and it deprives the insured of the power to confer on such carrier any right or benefit under the policy by contract or otherwise." 11 S.W. 180, 183.

The warranty, then, controls and the carrier can claim no benefit from the policy. See also 9 Am. Jur. 936, 937, Carriers § 827.

There is another reason why the tug cannot be given the benefit of the cargo insurance, and it was upon this ground that the district court based its conclusion. The tug was not, nor was its owner, a party to the memorandum bill of lading. It was not a carrier of the cargo for

whose benefit insurance might inure. The point is urged that by renting its tug to the carrier named in the bill of lading, Brown & Root became a carrier. This is contrary to the rule of the Mississippi Valley Barge Line case. The contract of Brown & Root was for towage and not afreightment, and this being so it could not, as a carrier, claim the benefit of insurance.

The third of the appellant's contentions is that it is entitled to recover from Magco the agreed price of $900 for its towage. It is admited that the amount was agreed to be paid and that it has not been paid. The appellees content themselves with a reference to the district court opinion in *Mississippi Valley Barge Line Co. v. T. L. James & Co., Inc.*, D. C. E. D. La. 1956, 144 F. Supp. 662, where it was held that the finding that a carrier is responsible for the loss of cargo renders moot a claim for towage as the allowance of such claim would only increase the damage which the carrier would be called upon to pay. There are factual differences between this case and the Mississippi Valley case. Here there was an undertaking that the tug would move the barge empty from Corpus Christi to Brownsville as well as move the barge loaded from Brownsville to Corpus Christi. The first movement had been made. No such condition prevailed in the cited case. There the barge and the entire cargo were lost. Here the barge was delivered at its destination with a part of the cargo on board. The libelant alleged that there was a cargo loss in excess of $23,000. It stated its damage to be only $20,507.49 which it had paid to its policyholders. The court, in a pre-trial order, found that this amount was less than the monetary value of the cargo loss and expense of salvage. If the owner of the cargo or the charterer of the barge had

damages for these items for which they were not compensated by insurance they failed to assert any claim for such damage. How the amount of the damage was computed does not appear. It appears that the amount of the recovery was for the loss of cargo and possibly also for salvage and other expense. It does not appear and we will not assume there was any reduction of the award by a towage allowance. If the insurer, as subrogee of the owner of the cargo, is to recover from the tug the full amount claimed by reason of its loss, it would seem that a denial to the tug of any amount for towage would result in the equivalent of a punitive damage award against the tug. See *Foss Launch & Tug Company v. The Kukui*, D.C.N.D.Calif. 1955, 130 F. Supp. 180; *McCormick v. Jarrett*, D.C.E.D. Mo. 1889, 37 F. 380. Such a result should not be enforced. The findings and conclusions of the district court do not mention the claim of the appellant for the hire of the tug. In the court's decree it is adjudged that Brown & Root take nothing on its cross-claims against Magco, Magcobar and Magnet, although there is no reference to the claim for tug hire. Whether the owner of the tug should be compensated for its hire and if so, how that compensation should be measured, should be determined by the district court. So that such a determination can be made the cause will be remanded. In all other respects the judgment of the district court will be affirmed.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

TUTTLE, Circuit Judge, Concurring Specially:

Having concurred in the opinion of this court in the Mississippi Valley Barge Line Co. case, *supra*, but since on more thorough consideration of it in relation to the Supreme Court's decision in Sacramento Navigation Company, I have some considerable doubt as to the correctness of our decision, I think it appropriate to point out some respects in which this case differs from Mississippi Valley Barge Line.

Here, as there, the barge was furnished by the shipper and not by the carrier. That is the distinguishing characteristic which we assigned for not following the Sacramento Navigation Company principle. Here, though, different from Mississippi Valley, there was no bill of lading issued by the owner of the tug for the carriage of the cargo. There was here only a contract for the hire of the tug to tow the barge, as is pointed out in the opinion of the Court. Furthermore, it is not contended here that Brown and Root were common carriers, a point which appellee says is critical in determining whether a Harter Act defense is available to it. The Mississippi Valley Barge Line Company was a common carrier by water, thus further distinguishing that case from this.

Finally, it appears in this case "that appellants pleaded that they had 'chartered' the tug; that the charter of the Tug 'R. A. Terrentine,' was one of engagement *only to tow* the barge of Magco Towing Co., Inc." (Emphasis added.) No such situation existed in Mississippi Valley.

I am, of course, bound by this Court's decision in the Mississippi Valley Barge Line case, more especially because I participated in it. If this were a similar case, however, I would announce my concurrence only because of the principle of stare decisis, since I now have some considerable doubt as to the validity of the distinction we there drew with Sacramento Navigation Co. As it is I am satisfied to point out the facts which I think distinguish this case from Mississippi Valley, and which clearly require the result announced by the Court.

APPENDIX II

OPINION OF DISTRICT COURT

435 FINDING OF FACT AND CONCLUSIONS OF LAW

(filed Dec. 30, 1958)

(Caption Omitted)

Libellant was the insurer of a cargo of drilling mud owned by Magcobar, Inc. (hereafter called Magcobar) and Magnet Cove Barium Corporation (hereafter called Magnet Cove). This cargo was lost while being transported from Brownsville, Texas, to Corpus Christi, Texas, on the barge LTC 6 which was under a bareboat charter to Magco Towing Company (hereafter called Magco Towing). Magco Towing had issued a "shipping order-short form bill of lading-memorandum" showing Magnet Cove as the shipper. Magcobar, Magnet Cove and Magco Towing are affiliated companies.

The loaded barge was being towed by the Tug R. A. Turrentine under a verbal contract of towage entered into some months before with Magco Towing whereby the tug was to tow the loaded barge from time to time for a given sum of money (in this instance $900). The barge was to be loaded by the employees of the Magco companies with cargo belonging to one or more of them and then towed by the Turrentine, in her exclusive custody and control. In this instance it had been so loaded by Magco Towing at Brownsville and pushed up the intercoastal canal and out into Corpus Christi Bay in the face of warnings of squally weather and rough wind and water. One of the cables holding the barge to the tugboat broke. The master

of the tug cast off his pushing cables and connected to the barge in a towing position. In maneuvering the barge so as to regain its heading toward the city docks it listed and the cargo was lost.

Libellant, as insurer of the cargo, paid the loss and brought this proceeding claiming subrogation against the Tug Turrentine and its owners, alleging both unseaworthiness and negligence in a number of respects. Respondents filed a petition under Admiralty Rule 56, impleading the Magco companies, alleging that under its agreement with Magco Towing the Tug "was simply to perform *towing services*, and the barge was to carry cargoes of the impleaded respondents, the tug having no responsibility except to *tow*, all responsibility with reference to the *loading, stowing and caring* for the cargo aboard the barge being the responsibility of impleaded respondents."[1] The Tug asked for decree against the impleaded respondents upon various grounds.

A pretrial hearing was held and an order entered reciting that the contract between Magco Towing and the Tug was for the *towing and transporting of the barge*, that Magco Towing was to load the barge and the Tug was to "furnish *towing services*." The issues to be tried were stipulated to be as follows:

(1) The negligence, if any, of the crew of the tug in towing of the barge or operation of the tug upon the voyage in question;

(2) The seaworthiness of the barge and its fitness to carry the cargo in question;

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[1] Emphasis supplied throughout this memorandum unless otherwise indicated.

(3) The negligence, if any, of the agents and employees of MAGCO TOWING COMPANY, INC., in the loading of the cargo in question upon the barge;

(4) Whether such negligent acts or omissions, if any, and unseaworthiness, if any, proximately caused the loss sued upon;

(5) The terms of the agreement for the *towing* of the barge, and the legal effect thereof; and

(6) The legal effect of the corporate status and relationship of Magnet Cove Barium Corporation, Magcobar, Inc., and Magco Towing Company, Inc.

Trial was had before the court and, after argument, a tentative finding of negligence upon the part of the Turrentine was announced from the bench but counsel were given time for the filing of briefs. The court now makes the following findings of fact:

(1) The Tug A. A. Turrentine was negligent in the following respects:

(A) The master was not sufficiently skilled to undertake the tow; (B) Free surface water was placed in the rake tanks of the barge in an improper manner, rendering the barge unseaworthy by reason of such negligence on the part of the crew; (C) In proceeding into Corpus Christi Bay under the existing conditions and continuing there instead of returning to, or seeking, sheltered water; (D) In making up the tow, after the breaking of the cable, so as to "tow" rather than continue to push the tow.

(2) Each and all of the foregoing acts of negligence was a proximate cause of the listing of the barge and the loss of its cargo.

(3) The barge was seaworthy and fit to carry the cargo which was properly loaded for the transportation to Corpus Christi had it not been for the negligence of the Tug and its crew which rendered the barge unseaworthy after it came under the exclusive control of the Tug; and

(4) The agents and employees of the Magco companies were not negligent in any respect in the loading of the barge and cargo.

Respondents' first defense is that there is no liability by reason of section 3 of the Harter Act (46 U.S.C.A. 192) which provides in substance that the owner of any vessel transporting merchandise or property, who exercises due dilligence to make the vessel seaworthy and properly manned, etc., shall not be liable for loss resulting from faults or errors in navigation or management of the vessel. Section 3, however, applies to affreightment, not towing, contracts;[2] and, of course, standing alone, Respondents' oral contract was one of *towing* only, as shown by the pleadings, the pretrial order and the facts emphasized above.

Respondents insist that this is a contract of affreightment, not of towing, pointing to (1) a provision in the pretrial order that "Any defense of the Respondents, . . . to the claim of each of said corporations" as to American

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[2] Mississippi Valley Barge Line Co. v. T. L. James & Co., Inc., (D.C. La., 111 F. Supp. 662, affirmed 5 Cir., 211 F. 2d 29).

[3] The Margaret, (D.C. Md., 95 F. 2d 36).

Home Insurance Company is a defense to its right by reason of subrogation"; (2) that Libellant sues as a subrogee of the owner of the lost cargo; (3) that payment of the insurance was made to the owners of the cargo, Magnet Cove and Magcobar, not to Magco Towing; (4) that the suit here is basically one by the cargo owners against the carrier, Magco Towing not upon the towing contract with Rerspondents made with Magco Towing; (5) and that the shipping order-short form bill of lading-memorandum called for a Uniform Domestic Straight Bill of Lading,[1] all of which show a contract of affreightment. But all of these arguments cannot alter the fact that Respondents' contract was for *towing, not affreightment*. While ". . .a towage contract may be covered by the by the Harter Act where it is actually one of 'affreightment' rather than 'towage'—i.e., where the shipper simply places his cargo in the custody of the barge-owner, who proceeds to tow it to destination,"[2] no such situation exists here. Respondents were careful to stipulate and emphasize in pleadings and oral argument that they did not contract to transport goods, or have anything to do with the cargo, but to *tow* a loaded barge. Indeed one of the principal points, strenuously argued but now not stressed, was that the cargo was improperly loaded; that Respondents' agents called attention to it but had an agreement that they were

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[1] Reading in part as follows: "... [illegible] ... shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading as set forth in ... official Southern, Western and Illinois freight classifications in effect on the date hereof, if this is a **rail** or a **rail-water** shipment, or ... in the applicable motor carrier classification or tariff **if this is a motor carrier shipment**".

[2] Gilmore and Black "The Law of Admiralty" ... citing Standard Navigation Co. v. Salz, 273 U.S. 329

not to be liable. It is significant that the pre trial stipulations and order did not name as one of the issues to be tried *the terms of the contract between the shippers and Magee Towing* but only "the terms of the agreement for the *towing* of the barge and the legal effect thereof".

In the cases cited by Respondents in which it was held that the contracts were for a freightment, not a wage, there either was common ownership of the tug and the barge[6] or an ownership pro hac vice where the owner of the tug had the barge under a time charter and was entitled to receive the freight[7] or an arrangement between the tug and barge whereby they were to split the freight.[8] None of these factors are present in the case at bar.

Respondents' next contention is likewise contingent upon their right to the benefits of the shipping order short form bill of lading memorandum between Magnet Cove and Magee Towing which contained the provision that it should be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading, etc., set out in footnote 4, supra. This Uniform Domestic Straight Bill of Lading carries many "contract terms and conditions" in fine print on the back, among which is, Sec. 2(c), providing that "Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance:

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[6] [illegible] AMC [illegible]

[7] [illegible] Supp. 332, 1943 AMC 1000.

[8] [illegible] AMC 1580

Provided, that the carrier reimburse the claimant for the premiums paid thereon."

Respondents contend (1) that since Magcobar and Magnet Cove, the shippers, had insurance on the cargo which Libellant paid off, therefore Magco Towing had the right to benefit from such insurance;[9] that Respondents would have the right to set off such fact as a defense against Magco Towing and, therefore, may assert it against Libellant, subrogee of the affiliated companies; and (2), that if the policy contains a provision voiding it in the event of a provision whereby the carrier is to have the benefit of insurance, then Libellant was not liable to pay the insurance and, being a volunteer, may not recover.[10] But again, I think, Respondents may not benefit from these provisions, not being a party to the shipping order-short form bill of lading-memorandum. To permit Respondents to escape liability for their negligence under the circumstances existing here would be as unjust as to deny recovery in any other case where a party had insurance covering the loss.

Proctors for both Libellants and Respondents make many other contentions, but it is not necessary to discuss them in view of the foregoing, which are adopted as findings of fact and conclusions of law.

JAMES V. ALLRED, Judge

Wichita Falls, Texas.

---

[9] Citing 24-B Tex. Jr. 808, sec. 403; Missouri Pacific Ry. Co. v. International Marine Insurance Co., 84 Tex. 149, 19 S.W. 459.

[10] Citing Insurance Company of North America v. Easton, 7 Tex. 167, 11 S.W. 480, 3 L.R.A. 824.

APPENDIX III

JUDGMENT

Extract from the Minutes of June 13, 1960.

TUG "R. A. TURRENTINE" Her Engines, Etc.,
BROWN & ROOT, INC., Claimant,

versus

No. 18016.

AMERICAN HOME ASSURANCE COMPANY,
ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellant, Tug "R. A. Turrentine", Her Engines, etc., Brown & Root, Inc., Claimant, be condemned to pay one-half of the costs of this cause in this Court; and that the appellees, American Home Assurance Company, and others, be condemned, in solido, to pay one-half of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court.

"Tuttle, Circuit Judge, Concurring Specially."

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect the date of the receipt by the carrier of the property described in Original Bill of Lading,

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

APPENDIX IV 42A

CARRIER'S NO.

SHIPPER'S NO. 76245

[redacted]

DATE SHIPPED	CAR OR VEHICLE INITIALS & NO.
6 - 13 - 56	Barge LTC #6

At Brownsville, Texas

CONSIGNED TO Magco Towing Company, Inc.
Corpus Christi, Texas

DESTINATION

ROUTING

Barge

From MAGNET COVE BARIUM CORPORATION

(Mail or street address of consignee—For purposes of notification only.)

CARRIER
Magnet Cove Barium Corp.

Subject to Section 7 of Conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor)

If charges are to be prepaid, write or stamp here "To be Prepaid."

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier
Per
(The signature here acknowledges only the amount prepaid.)

Charges Advanced
$

Number Packages	Package Size	[redacted]	KIND OF PACKAGE, DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Sub. to Cor.)	Class or Rate	Ck Col
8,590			BAGS, MAGCOBAR.	1,868,295		

"Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission"

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight".
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

The Fibre Boxes used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of Consolidated Freight Classification.

"If Intrastate consignment, then the provisions hereof shall be subject to the laws of Texas; all provisions not expressly restricted by such laws shall be applicable to this shipment."

MAGNET COVE BARIUM CORPORATION, Shipper,

Agent

Per s/ [illegible]

Per s/ [illegible]

Permanent postoffice address of shipper, HOUSTON, TEXAS, U.S.A.

CONSIGNEE

APPENDIX V

UNIFORM DOMESTIC STRAIGHT BILL OF LADING

CONTRACT TERMS AND CONDITIONS

Sec. 2 (c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 9. (a) If all or part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening, to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding,or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-hip, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the manage-

ment of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers

APPENDIX VI

SUBROGATION RECEIPT
Claim No. 10831

October 10, 1956

Received from AMERICAN HOME ASSURANCE COMPANY
the sum of Twenty-Thousand Five Hundred Seven and 49/100 Dollars ($20,507.49)
in full settlement of our claim under Policy Number 114 Decl. 29 issued by the said Insurance Company
for damage to and loss of the property as described below, shipped on board the BARGE "LTC 6"
sailing from Brownsville to Corpus Christi ; on or about June 13, 1956

In consideration of this payment, we hereby guarantee that we are the persons entitled to enforce the terms of the contracts of transportation set forth in the bills of lading covering the said property; and we agree that the said Insurance Company is subrogated to all of our rights of recovery on account of any and all such loss or damage from the carriers and from any other vessels, persons or corporations that may be liable therefor, including municipal corporations and governments, and we agree to assist the said Insurance Company in effecting such recovery; and we hereby authorize the said Insurance Company to file claims and begin suit against any such carrier, vessel, person, corporation or government and we hereby appoint the officers and agents of said Insurance Company and their successors, severally, our agents and attorneys in fact, with irrevocable power to collect any and all such claims and to begin, prosecute, compromise or withdraw, in the name of said Insurance Company, but at the expense of said Insurance Company any and all legal proceedings which they may deem necessary to enforce such claim or claims, including proceedings before any international tribunal, and to execute any documents which may be necessary to carry into effect the purpose of this agreement. We further agree to execute any documents which may be necessary to enable the said Insurance Company to proceed in accordance herewith, including any and all pleadings and releases which said Insurance Company may request us to execute; and we agree that any moneys collected from any such carrier, vessel, person, corporation or government, whether received in the first instance by the undersigned or by the said Insurance Company, shall be the property of the said Insurance Company.

The payment receipted for herein is accepted with the understanding that said payment shall not inure to the benefit of any carrier under the provisions of any contract of carriage or otherwise; that in making the payment the said Insurance Company does not waive any rights by subrogation or otherwise against any carrier or bailee; and that the acceptance of this receipt shall not prejudice or take away any such rights or remedies which the said Insurance Company would otherwise have by virtue of such payment.

MOUNT COVE BARIUM CORPORATION

By: Floyd A. Emy

MOCCHAR, INC.

By: Floyd A. Emy

DESCRIPTION OF PROPERTY:
989 Tons Drilling Mud, Pallets and Tarpaulins

CAUSE AND APPROXIMATE DATE OF LOSS: Loss of cargo overboard from BARGE "LTC 6" while in tow of Tug "R.A. TURNTINE", on or about June 15, 1956.

APPENDIX VII

INSURANCE POLICY PROVISIONS

"31. The assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the Bills of Lading and/or Charter Party. The seaworthiness of the vessel as between the assured and this Company is hereby admitted and the wrongful act or misconduct of the shipowner or his servants causing a loss is not to defeat the recovery by an innocent assured if the loss in the absence of such wrongful act of misconduct would have been a loss recoverable on this policy. With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

"32. Warranted free from liability for loss of or damage to the goods whilst in the custody or care of any carrier or other bailee who may be liable for such loss or damage but only to the extent of such carrier's or bailee's liability.

"Warranted free of any claim in respect of goods shipped under a Bill of Lading or contract of carriage stipulating that the carrier or other bailee shall have the benefit of any insurance on such goods, but this warranty shall apply only to claims for which the carrier or other bailee is liable under the Bill of Lading or contract of carriage.

"Nothwithstanding the warranties contained in this clause it is agreed that in the event of loss of or damage to the goods by a peril or perils insured against by this policy for which the carrier or bailee denies or fails to meet his liability this Company shall advance to the assured as a loan without interest a sum equal to the amount they would have been liable to pay under this policy but for the above warranties

the repayment thereof to be conditional upon and only to the extent of any recovery which the assured may receive from the carrier or bailee.

"It is further agreed that the assured shall with all diligence bring and prosecute under the direction and control of this Company such suit or other proceedings so enforce the liability of the carrier or bailee as this Company shall require and this Company agrees to pay such proportion of the costs and expenses of any such suit or proceedings as attach to the amount advanced under the policy."

LE COPY

OFFICE SUPREME COURT, U.S.
FILED
NOV 12 1965
JAMES R. BROWNING, Clerk

No. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FLUOR A. TURRENTINE, HER ENGINES, ETC., AND BROWN & ROOT, INC., Petitioner

v.

AMERICAN HOME ASSURANCE COMPANY, ET AL., Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMOND L. FORD, JR.
1517 Wilson Tower
Corpus Christi, Texas
Attorney for Respondents

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

TUG R. A. TURRENTINE, HER ENGINES, ETC., AND BROWN & ROOT, INC., Petitioner

v.

AMERICAN HOME ASSURANCE COMPANY, ET AL., Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reasons For Not Granting The Writ

I.

Writ of Certiorari should not be granted as to questions I, II and III because such questions do not set out with accuracy either the facts of the case or the implied holding of the Court of Appeals with reference to incorporation by reference of the Harter Act provisions in the shipper-carrier contract; and in the absence of a decision by this court that the provisions of the Harter Act were incorporated by reference no question has been presented which would affect the outcome of this case.

II.

Writ of Certiorari would not be granted as to questions I and II because they fail to set out accurately the relationship of the tug and barge in that these questions as presented imply that the tug was "hired" by the barge to fulfill an affreightment contract, with the tug in some way sharing the benefits and obligations thereof, whereas by petitioner's pleadings, proof, stipulation and opening statement to the court, the tug's relationship to the barge was to provide towing services only under an entirely different and separate contract and under the pre-trial stipulations of the parties the tug was operated, not by the operators of the barge (as is implied in the questions) but by the owners of the tug (petitioners here) and its agents, servants or employees.

III.

Writ of Certiorari should not be granted as to questions I and II because they fail to set out with accuracy that the trial court found as a fact that the Master of the tug was not sufficiently skilled to undertake the tow and from which finding petitioner did not press an appeal; and by reason thereof the tug was improperly manned and whether the Harter Act was incorporated by reference or not would be immaterial since the Harter Act requires that the vessel be properly manned.

IV.

Writ of Certiorari should not be granted on questions I and II because they are based on a position inconsistent with the position taken in the trial court with respect to the Harter Act in that on trial the petitioner claimed and

strenuously argued that the barge (which he now claims was a part of the unit for affreightment) was not seaworthy and was improperly loaded.

V.

Writ of Certiorari should not be granted as to questions I and II for the reason that there is no conflict in the decision of the Court of Appeals in the instant case and the cited case of *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 71 L.Ed. 663 and 47 S.Ct. 368; and there is no conflict between the Court of Appeals' decision in the instant case and the cases cited by petitioner as reasons for granting the writ.

VI.

Writ of Certiorari should not be granted as to question III for the reason that the question as presented fails to set out accurately the facts in the case in that the question neglects to state that the bill of lading provisions if incorporated by reference allow the carrier the benefit of any cargo insurance only "so far as this shall not void the policies or contracts of insurance." (Pet. for Cert. 43)

VII.

Writ of Certiorari should not be granted as to question III for the reason that the cases cited by petitioner in his application for a writ do not in any way conflict with the holdings of the Court of Appeals in the instant case.

VIII.

Writ of Certiorari should not be granted as to question IV because it does not involve a major question worthy of the time and study of this court.

Corrections to Petitioner's Statement

The statement of the case by petitioner is inaccurate in the following respects:

As to Questions I and II:

1. The bill of lading covering the cargo shipped did not provide for Harter Act defenses.

2. The petitioner did not claim or attempt to show compliance with the Harter Act.

3. The trial court found a failure to man properly petitioner's tug.

As to Question III:

1. The petitioner (now claiming that the tug and barge were a single unit for affreightment) adopted the position that the barge was unseaworthy and introduced evidence and argument to prove it, alleging and presenting evidence that the barge was improperly loaded, that necessary eye pads for cargo security were removed, and that the barge had a rip in the fabric at or close to the water line.

2. Petitioner neglects to point out in his statement that the uniform domestic straight bill of lading if incorporated provides that the carrier has the benefit of insurance only "so far as this shall not void the policies or contracts of insurance."

As to Question IV:

1. Petitioner neglects to point out that it was stipulated between the parties that the amount agreed to be at issue in the case was less than the amount of the monetary value of the cargo lost.

Reasons For Not Granting The Writ

In discussing this case, by reason of the similarity of the names of Respondents, Magnet Cove Barium Corporation (owner of the cargo) and Magcobar, Inc. (its sales agent) will be referred to as owner; Magco Towing Company, Inc. (the private carrier, charterer and operator of the barge) will be referred to as private carrier or barge; and the tug R. A. TURRENTINE and its owners and operators, Brown & Root, Inc., will be referred to as tug:

I.

Question I presented for review specifically states that Section 3 of the Harter Act was incorporated into the bill of lading covering shipment.

In this case, two contracts are involved.

The first is a contract between the owners of the cargo (or its agent) and the private carrier, operator of the barge. The contract is a bill of lading and is in writing. Petitioner, owner of the tug, is not a party to the written contract and is not mentioned therein.

The written contract makes no mention of the Harter Act but it does say, in part:

> "That every service to be performed hereunder shall be subject to all the terms and conditions of the uniform domestic *Straight Bill of Lading* set forth (1) in the Official Southern Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classifications or tariff if this is a motor carrier shipment."

The Official Southern, Western and Illinois uniform domestic straight bill of lading does contain the Harter Act provisions.

The second contract, the oral between tug and private carrier makes no reference to the Harter Act in any way.

The question presented obliquely by petitioner is whether the tug has the benefit of the Harter Act under these circumstances. Inherent in that question is the question of whether, first, the contract between the owner and private carrier in fact did incorporate the Harter Act, and second, whether in some way, if incorporated, the tug became a party to that contract entitled to its benefits and bound by its obligations, and third, whether, if the Act was incorporated, and if the tug became a party, it complied with the terms of the Harter Act by showing on trial that both the tug and the barge were properly manned, seaworthy and properly loaded.

In his petition for certiorari, petitioner does not argue that there was an incorporation by reference of the Harter Act. Parenthetically, petitioner never has. Petitioner has simply *stated* that the Harter Act was incorporated in the owner-private carrier contract. Petitioner does not discuss the wording of the alleged incorporation by reference nor the proposition that the wording affects an incorporation. Petitioner does not discuss whether this is a "rail" shipment, or a "rail-water" shipment, or a "motor carrier" shipment. There is no question in the case but that this was a shipment entirely by water and it would seem that it is manifestly impossible for the condition of incorporation to have been met.

Petitioner does not mention the statement of the Court of Appeals in its opinion (Pet. for Cert. 29), to wit:

> "Since the transportation and towage which gave rise to this litigation was neither a shipment by rail, rail-water nor motor carrier, it is difficult to see how the bill of lading called 'official' could have been incorporated into the memorandum bill of lading when the stated condition of incorporation was not met."

Petitioner concedes by his citation at p. 14 of the Petition for Certiorari of the case of *Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, 2 C.C.A., 1937, 89 F. 2d 865, cert. den. 302 U.S. 706, 58 S. Ct. 25, 82 L. Ed. 545, that, in the absence of an incorporation by reference in the contract between owner and private carrier, even the private carrier would have no standing whatsoever to claim any benefit of the Harter Act. And if incorporated such incorporation would redound to the benefit of the tug only if, in some way, the petitioner were a party to that contract as a result of entering into the separate and independent towing contract with the barge.

Simply stated, questions I, II and III presented to the court would not affect the decision in this case because those questions affect the decision only if the court rules on a question which has not been presented to it and which is a primary and not a subsidiary question, to wit, whether there was an incorporation by reference of the Harter Act. The Court of Appeals having indicated as hereinabove set out that there was no such incorporation and the quoted language of the bill of lading demonstrating that there could be none and no authority or citation on the question being presented, there is nothing of substance presented to this court.

II.

Questions I and II assume that the tug was hired by the private carrier to be operated by it as a part of a contract of affreightment between the owner and the private carrier and that the tug was to be operated by the private carrier with the private carrier's agents and employees. This assumption is incorrect and contrary to the record in the case. The pre-trial order entered in this case (R. 73, 74) provides in part:

> "Brown & Root, Inc., is a corporation and upon the *times and occasions* in question were the owners of the tug, R. A. TURRENTINE and the members of the crew of that tug were the employees of Brown & Root, Inc., and its servants and agents. Brown & Root, Inc., was the *operator* of the tug, R. A. TURRENTINE." (emphasis added)

Other pertinent parts of the pre-trial order are that the ~~carrier~~ T46:

> "was to tow or transport the tow, LTC-6"

and:

> "Among other terms the loading of cargo aboard the barge, LTC-6, was to be done and was done by Magco Towing Co., Inc., and its agents and the tug, R. A. TURRENTINE was to furnish tow service to said tow."

and in petitioner's pleadings (R. 23, 24):

> "Petitioner would respectfully show that under the terms of the agreement with impleaded Respondents

and each of them the tug R. A. TURRENTINE was to perform *towing services only* and it was in no wise to be responsible for the *loading, stowing and caring* for the cargo aboard the barge, LTC-6." (emphasis added)

and again in petitioner's pleadings (R. 17) cargo owner:

"expressly insisted on previous occasions that their responsibility was to load and stow the cargo and it was no responsibility of Respondent or its tug and that the loading was proper; *since there could be no doubt that such was the responsibility of the barge and cargo owner under the charter agreement for towage no further protest was made between employees of Respondent or the crew of the tug;* . . ." (emphasis added).

Further at the beginning of the trial in response to a request by the court for a statement of the respective positions of the parties (R. 92, 93), Proctor for petitioner made the following statement:

"Your Honor, we claim that we had here a contract to perform *towing services only* and it was on a per-trip basis . . . so it is our position that the cargo was *negligently stowed* and therefore—I do not know whether I have used the word 'unseaworthiness' in my defense or not—*the barge was unseaworthy* at the outset of this voyage . . . in addition to that, of course, we have pleaded we were not negligent in the towing operation." (emphasis added)

These quotations and the statement by the trial court (R. 367) to wit:

"Respondents were careful to stipulate and emphasize in pleadings and oral argument that they did not con-

> tract to transport goods, or have anything to do with the cargo but to *tow* a loaded barge."

demonstrate that the petitioner's claim on trial was that there was clearly a towage contract insofar as petitioner was concerned and not a contract of affreightment as now claimed.

Question I further purports to state that Respondent is attempting to hold petitioner to the obligations of a carrier. There is no such attempt. Respondent attempts to hold the tug to its obligations as a tower and specifically in its pleadings, in its statement to the court, in its stipulations in the pre-trial order, recognized that the seaworthiness of the barge and its proper loading were its obligations and that the tug and the barge were not to be treated as a unit for the purposes of the contract of carriage.

III.

Petitioner seeks the protection of the Harter Act. To be available to him it was at least necessary that he produce evidence to demonstrate that the unit for affreightment was seaworthy, properly manned and properly loaded. A fortiori, it is indispensable that the court not have found that the tug was improperly manned. If the tug were improperly manned, and if the court on trial so found, it would be indispensable that the petitioner have urged that point on appeal to the Court of Appeals and further urged to the extent possible in its Petition for Certiorari that such finding was not supported.

The learned trial judge found the R. A. TURRENTINE negligent in the following respects (R. 365):

> "The Master was not sufficiently skilled to undertake the tow."

Here is a finding of improper manning of the tug. No reference is made to it in the Petition for Certiorari to void its effect of destroying the protection, if any, of the Harter Act. It would seem that it is indispensable to petitioner's position that such finding be nullified, otherwise the entire question is moot.

IV.

As is pointed out above, petitioner is now taking a position so contrary to his position on trial with reference to the question of whether petitioner's obligation was to furnish towing services only as distinguished from a contract of affreightment that it is difficult to recognize this case as the same case which was tried.

Petitioner's entire pleadings set forth above are directed toward the position that the barge was unseaworthy and was at fault, that the contract of the tug absolved it from any duty involved in an affreightment contract with respect to the barge which he now claims to be a part of the vessel carrying the goods.

In commenting on this question the trial court (R. 367) states:

> "Indeed one of the principal points, strenuously argued against but not now stressed, was that the cargo was improperly loaded . . ."

In cross-examination (R. 250) petitioner sought to show that there was a tear in the fabric of the barge below the water line with a view to attempting to show that the barge was unseaworthy.

Similarly (R. 211) petitioner sought to show that the eye pads on the deck of the barge for stability of the

cargo were cut off with the argued result that such removal caused the barge to be unseaworthy.

In essence, then, throughout the trial as the trial court has found and as the evidence demonstrates, rather than undertaking the burden of proof of showing the barge, which it now claims to be a part of a unit with the tug for affreightment purposes, to be seaworthy, petitioner sought to show consistently that the barge was unseaworthy; and if it were established that the unit for affreightment purposes was unseaworthy, then, of course, the provisions of the Harter Act would not be met and petitioner would be deprived of their benefits. Therefore, it is apparent that the present claim that there was a contract of affreightment insofar as the tug is concerned as contrasted with a contract to perform towing services only is manifestly inconsistent with the case as tried below and should not be given consideration by this court.

V.

Even if all of the facts were as inaccurately and inadequately stated by petitioner there is no conflict in the cited decisions. In fact, they are consistent with and actually support the position of both courts below.

The prime case cited for petitioner's proposition, *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, held that for purposes of the Harter Act a barge and tug are one vessel if the barge and tug are owned and operated by one common carrier either in direct ownership or ownership pro hac vice. The court approved, however, holdings of other courts that where there is a distinct and separate ownership and a contract between tug to perform towing services, the Harter Act

was not available. In the *Sacramento* case the court said in part:

> "Respondent contends that his view to the contrary is sustained by *The Murrell*, D. C. 200 Fed. 826 affirming (C.C.A. 1st) 195 Fed. 483, and The Coastwise, 147 C.C.A. 71, 233 Fed. 1, affirming (D. C.) 230 Fed. 505. Some things are said in those cases which if we should not consider the differences between them and the present case, might justify this contention. The most important of the differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held and this holding was the basis of the decision. Here, upon all the facts as we have just said, the contract upon which Respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel."

There can, then, be a contract to tow "separated" as petitioner says, from a contract of affreightment by even a common carrier and that contract of towage can create a liability to the cargo owner by the tow by negligent towage of the barge.

Since it was stipulated by pre-trial order that petitioner tug's contract was one to perform towing services only the present case sets well within the reasoning of the court since it was not only held that the contract was one of towage but it was pleaded, stipulated and proved.

In re O'Donnell, 2 C.C.A. 1928, 26 Fed. 2d 334, cited by petitioner, it simply says that an ownership of the tug and barge pro hac vice is accomplished by agreement of the respective operators of tug and barge together to solicit freight, deduct all expenses and share the profits.

The implication of the decision clearly is that while:

> "A partnership stricti juris is not essential . . . it is enough if the owners make a joint contract of carriage with the shipper to the performance of which each binds a necessary vessel."

The Bathgate, 19 Fed. 2d 663, D. C. affirmed on appeal under the style *Insurance Company of North America v. Southern Transportation Co.*, 3 C.C.A., 1928, 25 F. 2d 103, cert. den. 277 U.S. 589, 48 S. Ct. 437, 72 L. Ed. 1002 simply holds that where a barge and tug were owned by the carrier the case is governed by the Sacramento case.

The Fred Smartley, Jr., 4 C.C.A., 1939, 100 F. 2d 971, cited by petitioner, actually supports Respondent. Carrier had a contract to transport goods aboard its barge. The tug was engaged to tow the barge. The Harter Act protection was denied to the barge because it was found unseaworthy but the tug was relieved of liability because it was not negligent. This, then, affects *separation* of the *towing* contract from the *affreightment* contract because if the barge and tug in *The Fred Smartley, Jr.* case were a unit for affreightment contract purposes, the unseaworthiness of the barge renders the *vessel* (tug and barge unit) unseaworthy and *both* should have been denied the protection of the Harter Act. Since they were not, the situation in the case before the court is identical and the result should be that the tug having been found negligent and the barge seaworthy the tug should be held and the barge absolved.

The Lehigh, W.D.N.Y., 1935, 12 F. Supp. 75 and *The Marmor*, S.D.N.Y., 1944, 56 F. Supp. 435, also cited, simply held respectively that common operation of a tug and barge by a transportation company are sufficient to bring the case under the Sacramento case and a 60-40 division of

freight between tug and barge was sufficient to warrant a holding that there was an ownership pro hac vice. *The Vale Royal*, D. Md., 1943, 51 F. Supp. 412, similarly holds that a common direction of a tug and barge by a carrier are sufficient to warrant a holding of ownership pro hac vice.

In the case of *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den. 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, which petitioner concedes supports Respondent's position, it is interesting to note that one of the successful litigants in that case was Brown & Root, Inc., one of the petitioners here. Brown & Root's position successfully taken in that case is the ground on which the court based its decision in the instant case and Brown & Root here is seeking to change the effect of that holding.

In *River Terminals Corp. v. Southwestern Sugar & Molasses Co.*, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, Respondent finds another case cited by petitioner which actually supports Respondent's position. This Honorable Court in that case states that, subject to the Interstate Commerce Commission's approval of such a provision in a tariff, a tug may, as to a carrier with whom it enters into a contract to perform towing services, make a different contract for towing separate and apart from the affreightment contract with restricted liability provisions in the towing contract particularly where it picks up another's loaded barge without responsibility by the tug for loading and with a restricted possibility for inspection of the barge. Here again a separation of the two contracts is recognized and the carrier and the tug are allowed to enter into their own terms apart from the shipper contract.

In addition to the foregoing *Ideal Cement Co. v. The Tickfau*, (E. D. La., 1953) 143 F. Supp. 904, 1956 AMC 2177, supports Respondents's position:

> "Ordinarily, if the undertaking is one of carriage the carrier furnishes the vehicle of carriage, its own bill of lading with such terms as it provides, . . .
>
> "In the light of what took place, I am impressed that the alleged bill of lading was to serve the purpose of showing that the barge and its contents therein described had been received by claimant (tug owner) who, in its original answer, admitted it had been picked up as a tow."

And the court in that case referring to the *Cornell Steamboat Co. v. U. S.*, 321 U.S. 634, 1944 AMC 344 (1944), states that a study of the present steamboat litigation:

> "leaves no doubt that while a carrier engaged in towage may be certificated under the Interstate Commerce Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with respect to towage."

VI.

In the question presented as question III and in its discussion petitioner never sets out that the bill of lading, if incorporated by reference in the memorandum bill of lading between owner and private carrier, and if, in some way the tug became a party to that contract, that the carrier had the benefit of cargo insurance only

> "sofar as this shall not void the policies or contracts of insurance." (R. 43)

The failure to include this limitation on insurance rights makes the question presented so inaccurate and incomplete as to warrant this court not considering it.

It was stipulated that there was a warranty against a claim by the carrier (Pet. for Cert. 47) and it is recognized by petitioner that such a warranty is effective to destroy the insurance if the claim is valid. This petitioner does not deny. The intention of the bill of lading then is that where there is such a warranty against it, the carrier will not have the benefit of the insurance. The carrier recognizes under such a bill of lading provision that there are two kinds of insurance policy, one of which permits the carrier to have the insurance protection and the other of which provides that if there is an attempt to transfer the benefit of insurance to a carrier the policy is voided by the breach of the warranty. The bill of lading provision then is designed to set forth that if there is no clause voiding the insurance for a claim by the carrier, the carrier will make such a claim, but if a clause avoiding the insurance is present the carrier shall not have the benefit of insurance. This is a business transaction under a tariff uniform in its application and designed to cover a situation identical to the one in the present case. There could be no other purpose of the bill of lading provision but to insure that the insurance would be good and would not be defeated by any claim that the carrier is entitled to its benefits. Both the insurance company and the carrier designed their respective agreements to effect the exact results held by the Court of Appeals and no good reason exists to fail to give effect to the intention of both parties.

The reasoning of the court in the case of *W. J. McCahan Sugar Refining Co.*, 1918, 248 U.S. 139, 39 S. Ct. 53, 63 L. Ed. 170 supports the result in this case and is cited by

petitioner. The facts in that case being virtually identical excepting (1) in that case the carrier under the bill of lading had a.. absolute right to the insurance regardless of its effect on the contracts or policies of insurance, and (2) the loan agreement providing for a loan to be repaid only out of proceeds of collection from the carrier was made subsequent to the loss instead of before. No good reason appears and no good reason is argued to question the legality or effect of either of the two provisions.

The only case found to treat specifically of the identical problem involved in this case is *Hartford Fire Ins. Co. v. Payne*, 199 Iowa 1008, 203 N.W. 4, 39 ALR 1109. In that case an identical provision in the bill of lading was involved and the court held that the insurer may recover against the carrier any loss caused by its fault notwithstanding provision in the shipping contract; and the fact that the insurer voluntarily pays the claim of shipper without setting up the invalidity of the policy is immaterial.

The court in part says:

> "This provision of the shipping contract does not give to the carrier the benefit of all valid insurance, but only the benefit of all insurance that would not be rendered invalid by the destruction of the right of subrogation, and gives the carrier no benefit of insurance when to do so would render the insurance invalid. The clause in question speaks of a contingency, not of a result accomplished. If to apply the provision giving the carrier the benefit of insurance would render the insurance invalid it is not to be applied, and the insurance contract is not invalidated; but if to apply it would not render the insurance invalid, then it is to be applied, and the carrier is entitled to the benefit of the insurance."

VII.

As pointed out hereinabove none of the cases cited on the insurance question conflict with the holdings of the Court of Appeals in the instant case. In none of those cases a similar provision in the bill of lading involved and in none was a loan receipt agreement involved except *W. J. McCahan Sugar Refining Co.* in which the principle of the loan receipt was approved as a desirable business arrangement to effectuate rapidly making money available to the shipper without having to wait to determine whether the carrier was liable or not.

Conclusion

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully submits that a Writ of Certiorari should not be granted on the questions submitted by petitioner.

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Certificate of Service

This will certify that copies of this brief have been previously served on Attorney for Petitioner.

EDMOND J. FORD, JR.

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JAMES R. BROWNING, Clerk

NO. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

TUG R. A. TURRENTINE, HER ENGINES, ETC., AND BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY, ET AL., *Respondents*

PETITION FOR REHEARING

Of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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AMERICAN HOME ASSURANCE COMPANY, ET AL., *Respondents*

PETITION FOR REHEARING

Of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

Brown & Root, Inc., petitioner herein, respectfully petitions this Honorable Court for a rehearing herein of the order of this Honorable Court entered herein on December 5, 1960, denying its petition for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, and for grounds therefor would respectfully show:

1.

Respondents have acknowledged, by urging that the decisions of the Circuit Courts of Appeal overruled by the decision of this Court in the leading case of *Sacramento Steam Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, namely the cases of *The Murrell*, 200 F. 826, and *The Coastwise*, 233 F. 1, are cases of analogous circumstances where the towing tug was held liable to the cargo owner for cargo carried aboard the towed barge, that the decision of the Court of Appeals herein is directly in conflict with the decision of this Court in the *Salz* case, and of the Court of Appeals for the Second Circuit in the case of *In re O'Donnell*, 2 Cir., 1928, 26 F. 2d 334, at 336.

2.

In addition to the doubts of the correctness of the decision of the Court below in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den., 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, leave to file petition for extraordinary relief denied, 256 F. 2d 344, (upon which decision the Court of Appeals based its decision against petitioner) expressed in the concurring opinion by Judge Tuttle herein, other judges of the Court of Appeals have now expressed grave doubts of the correctness of the decision in the *James* case, namely the Court of Appeals speaking through Jud[illegible] Brown in the case of *Pershing Auto Rentals, Inc. v. Gaffney*, 5th Cir., June 15, 1960, 279 F. 2d 546, 547, in referring to the decision in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 5th Cir., 1958, 253 F. 2d 922, at pp. 924-925, 1958 A.M.C. 1534, 1536, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 A.M.C. 1631;

5th Cir., 1960, 274 F. 2d 36. It therefore now appears that several judges of the Court of Appeals doubt the correctness of the rule of decision of that Court in the *James* case, and petitioner respectfully submits rightly so, and that this Honorable Court should now on rehearing set the matter at rest by granting certiorari herein.

3.

The procedural objections to the granting of the writ made by respondents are without merit, having been correctly overruled by the Court below, which found that petitioner would have been entitled to the defenses of the Harter Act (embodied by reference in the bill of lading issued here) but for the Court's rule of decision in the *James* case, that the relationship here was one of towage and not affreightment so that the towing tug was denied the defenses accorded the carrier by the affreightment contract.

Statement and Argument

Respondents have correctly stated in their reply to the petition that there are two contracts here: one the oral one between the carrier and the towing tug by which petitioner contracted to tow the carrier's barge upon which the carrier later loaded the cargo for damages to which this suit was brought, and the other the printed and typed contract between the cargo owner and the carrier set forth in the short-form bill of lading by the terms of which the carrier agreed to transport the cargo and the cargo owner (whose own printed form of bill of lading was used) agreed that it would accord the carrier the defenses embodied in the Uniform Domestic Straight Bill

of Lading, among which were the Harter Act defenses relied on by petitioner and denied it by the Court below.

To the first agreement, between the carrier and the petitioner, the tugboat owner and operator, the cargo owner was *not* a party. There was *no agreement* by the petitioner with the cargo owner *to transport cargo;* its only agreement was with the carrier, and this agreement was to tow the barge. Yet the Court below has held petitioner liable to the cargo owner just as though it were the carrier and just as though petitioner were a party to the affreightment agreement and was the carrier—and yet it has denied petitioner the carrier's defenses! It has accorded the *cargo owner* the rights of the *carrier*, vis-a-vis the tugboat.

The second agreement, in short bill of lading form, was that written contract by which the carrier agreed to transport the cargo, by water. In this agreement no mention was made of petitioner or its towing tug, though of course since the bill of lading did state the cargo was to be transported by barge and from one port to another there can be no doubt (and petitioner does not controvert the fact) that the agreement was one of affreightment by water and that the carrier impliedly agreed and was therefore obligated to employ motive power (here petitioner's tugboat) to perform its contract of carriage.

Petitioner respectfully submits that the respondents in their brief herein in opposition to the petition for writ of certiorari have formally and completely acknowledged petitioner's right to grant of the writ, and have confessed the error of the Court of Appeals herein, by urging that the circumstances of the instant case are analogous to the facts of the cases overruled by this Court in its decision

in *Sacramento Steam Navigation Co. v. Salz*, 273 U.S. 326, and that they have thus also acknowledged the Court of Appeals' decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re O'Donnell*, 2 Cir., 1928, 26 F. 2d 334, at 336.

The statement of respondents discussing the *Salz* case in their opposing brief is as follows: (pp. 12 and 13)

> ". . . The Court approved, however, holdings of other courts that where there is a distinct and separate ownership and a contract between tug to perform towing services, the Harter Act was not available. In the *Sacramento* case the court said in part:
>
> "'Respondent contends that his view to the contrary is sustained by *The Murrell*, D.C. 200 Fed. 826 affirming (C.C.A. 1st) 195 Fed. 483, and The Coastwise, 147 C.C.A. 71, 233 Fed. 1, affirming (D.C.) 230 Fed. 505. Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of the differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held and this holding was the basis of the decision. Here, upon all the facts as we have just said, the contract upon which Respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel.'
>
> "There can, then, be a contract to tow 'separated' as petitioner says, from a contract of affreightment by even a common carrier and that contract of towage can create a liability to the cargo owner by the tow by negligent towage of the barge."

Please contrast respondents' view of these decisions with that of the Circuit Court of Appeals for the Second Circuit: Judge Learned Hand's opinion in *In re O'Donnell*, 126 F. 2d 334, at 336, makes it perfectly clear that the two cases referred to by respondents as persuasive authority in analogous circumstances to the facts of the instant case were overruled by the *Salz* case and also held to be no longer authoritative by the Circuit Court of Appeals for the Second Circuit. The Court said (at p. 336):

> "Sacramento Nav. Co. v. Salz, if not a departure from the earlier doctrine, at least settled the law against some earlier decisions. In spite of the guarded language used, it is impossible to suppose that it did not overrule The Murrell (Baltimore & Boston Barge Co. v. Eastern Coal Co.) 195 F. 483 (C.C.A. 1), and The Coastwise, 233 F. 1 (C.C.A. 1). It is true that the opinion formally left these untouched, but only on the theory that the contracts had there been held to be for towage. Since both vessels were owned by a single owner, the decisions certainly can no longer stand on their facts, and were not meant to be approved, as we understand it. . . ."

There can therefore be no doubt that respondents have acknowledged, and quite correctly so, that the decisions of the Court below in this instant case and in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, are in direct conflict with the decision of this Court in *Sacramento Steam Navigation Co. v. Salz*, and the decision of the Court of Appeals for the Second Circuit in *In re O'Donnell*.

Several Judges of the Court Below Doubt the Correctness of Its Decision in the James Case

As petitioner has pointed out in its original petition and supporting brief, the Court below held against petitioner

on the ground that while petitioner would have been entitled to judgment under the Harter Act defenses embodied in the contract for carrying the cargo had it been the carrier, that its decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den., 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, established petitioner was *not* the carrier and was only engaged to tow the barge and hence could not urge to the claims against it made by the cargo owner any defenses accorded by the bill of lading, to which it was not a party.

The *James* case is of course actually not yet finally decided, and hence should not properly have been relied upon by the Court of Appeals. Please see the per curiam opinion, *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1958, 256 F. 2d 344, where the Court expressly held on application by the losing party for extraordinary relief (urging the obvious conflict in result between the *James* case and *River Terminals Corp. v. Southwestern Sugar & Molasses Co.*, 253 F. 2d 922), that its decision would hereafter be re-examined in connection with an appeal from the final decree (the *James* decision, 244 F. 2d 263, being made upon an appeal from an interlocutory decree in admiralty).

Since the original petition herein was filed, it has come to the attention of petitioner that yet other judges of the Court below greatly doubt the correctness of the rule of decision in the *James* case. As pointed out in the original petition, in the instant case in his concurring opinion Judge Tuttle expressly states his doubt of the correctness of the *James* case, as well he might in view of the decision in which he spoke for the Court in *River Terminals Corp.*

v. Southwestern Sugar & Molasses Co., 5th Cir., 1958, 253 F. 2d 922, where it is expressly stated that the decision of the *James* case is of doubtful authority.

Now Circuit Judge Brown, learned in admiralty, in referring to those references to the *James* decision made in the *River Terminals Corp. v. Southwestern Sugar & Molasses Co.* decision, expresses his (and presumptively also those of the two other judges then sitting, though Judge Hutcheson was a member of the Court also in the instant case) doubts of the correctness of the *James* decision. In *Pershing Auto Rentals, Inc. v. Gaffney*, 5th Cir., June 15, 1960, 279 F. 2d 546, 547, he refers to Judge Tuttle's opinion in the *River Terminals* case where the *James* case is dealt with in these words:

> "... We do not have to decide whether this is an occasion for the exercise of our undoubted right and duty to reexamine a former decision when its correctness has been brought sharply into question. River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5 Cir., 1958, 253 F. 2d 922 at pages 924-925, 1958 A.M.C. 1534, 1536, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 A.M.C. 1631; 5 Cir., 1960, 274 F. 2d 36 ..."

Petitioner therefore respectfully submits that it now appears that several of the judges of the Court of Appeals for the Fifth Circuit plainly consider that the Court's decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 244 F. 2d 236, relied on by the Court below as controlling here, is probably erroneous. While the parties to that case can still have their rights adjudicated on appeal from the final decree and the incorrect decision set aside

as to them, no such recourse is in usual course open to the petitioner herein, who can obtain relief from the effect upon the decision of this case of the erroneous decision of the *Mississippi Valley Barge Line Co. v. T. L. James & Co.* only here.

The Procedural Objections Raised by Respondents Are Completely Without Merit

First of all of course the Court below paid no heed to these contentions, which were there raised, and therefore must be considered overruled. As its decision plainly shows, the Court below affirmed the trial court's decision that the carrier's vessels (of course including petitioner's tug) were seaworthy and expressly stated that were the case not ruled in its view by its decision in the *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, the petitioner would have been accorded the Harter Act defenses embodied by reference in the bill of lading and found not liable.

Furthermore, the contentions themselves have no merit, in the pleadings, facts proved, or law.

Petitioner expressly pleaded that it was engaged only to tow the barge and that it performed its contract properly and delivered the barge to its destination, and that while it had no liability to cargo, had the carrier not improperly loaded the cargo on the barge it would have likewise safely towed and delivered the cargo on the barge to its destination. It urged the liability of the carrier for improperly loading the barge. Alternatively, it urged that if it be held to the obligations of the carrier to the cargo owner, and if it be held that the cargo owner could claim directly

against petitioner's towing tug, that it was entitled to the defenses to which the carrier was entitled under the Harter Act. The pre-trial stipulation of the parties (hardly needed in this admiralty cause) expressly stated that one of the points at issue was whether the relationship of the parties here was one of *towage*, (or, in other words, whether on the other hand it was one of affreightment). That the trial court had before it all these contentions appears plainly from its decision.

Even if the pleadings were defective, which plainly was not so, since the issues were all tried no later objection can be made to the pleadings. Please see *Val Marine Corp. v. Costas*, 2 Cir., 1959, 256 F. 2d 911, at 915, 1959 A.M.C. 108, 114, where the Court said:

> " . . . But in any event, under F.R. 15(b), a practice well known in admiralty,[6] when issues not raised by the pleadings are tried by express or implied consent of the parties, they are to be treated in all respects as if raised in the pleadings. See also F.R. 54(c), applying a similar rule with respect to matters not expressly covered by the prayer for relief. Thus if a further formal pleading be deemed necessary, the application of this principle thoroughly fills the gap. . . ."

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[6] Fyfe v. Pan-Atlantic S.C. Corp., 2 Cir., 1940 A.M.C. 1037, 111 F. 2d 72, 78, certiorari denied Pan-Atlantic S. S. Corp. v. Fyfe, 311 U.S. 711, 1940 A.M.C. 1672; Menefee v. W. R. Chamberlin Co., 9 Cir. 1950 A.M.C. 1325, 183 F. 2d 720; The Roslyn, 2 Cir., 1937 A.M.C. 1575, 93 F. 2d 278; The Minnetonka, 2 Cir., 146 Fed. 509 certiorari denied 203 U.S. 589; 2 Benedict on Admiralty 559 (6th Ed. 1940). See also Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 4 Cir., 35 F. 2d 433, 439, rehearing denied 36 F. 2d 224, certiorari denied 280 U.S. 609.

Conclusion

It is therefore manifest that respondents have now formally acknowledged and confessed what is quite plain and obvious, that the Court below has departed from the decision of this Honorable Court in *Sacramento Steam Navigation Co. v. Salz* and has returned to the erroneous decisions overruled in that decision, and that its decisions in the instant case and in *Mississippi Valley Barge Line Co. v. T. L. James & Co.* are directly in conflict also with the decision of the Court of Appeals for the Second Circuit in *In re O'Donnell* (as well as with the other decisions, including its own, referred to in petitioner's original petition herein); and that these decisions are probably erroneous is now recognized by several judges of the Court below.

Within the jurisdiction of the Court of Appeals for the Fifth Circuit are great inland waterways upon which move very many cargoes transported aboard barges towed by tugboats constituting a large part of the country's domestic commerce. Of course in such water-borne commerce towage of the carrier's cargo-laden barge by the carrier's tugboat is only a part, though an integral part, of the carriage of the cargo agreed by the carrier to be performed for the shipper. Whether the tugboat is operated by the carrier or rented by the carrier is properly no concern of the shipper, as the decision of this Court in *Sacramento Steam Navigation Co. v. Salz* establishes. To let the shipper take the place of the carrier and to sue the tug for improper towage, as here the Courts below have done, and thus to avoid the contract of cargo carriage, is to confuse the relationships of the parties to the transportation of the cargoes contrary to established legal principles and to upset the

law governing transportation by water upon the country's great inland waterway system.

For these reasons, set forth above, petitioner respectfully prays that this motion for rehearing be granted, and that its petition for issuance of writ of certiorari be granted, and that upon hearing the judgment of the Court of Appeals be reversed.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner
Brown & Root, Inc.

Certificate (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered December 5, 1960, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

Certificate of Service

I certify that copies of the foregoing petition for rehearing have been served upon opposing counsel of record, Edmond J. Ford, Jr., properly addressed to him at his office at 1517 Wilson Tower, Corpus Christi, Texas, in the United States mail with adequate postage affixed thereto.

ROBERT EIKEL